v. Alpon Laboratories, No. 02-C-408-C, 2002 U.S. Dist. LEXIS 23013 (W.D. Wis. Sept. 25, 2002)," the District Court for the Western District of Wisconsin interpreted Chapin as stating that law, and found that a state attorney general seeking recovery of state Medicaid overpayments based a substantial federal question because the issue of what constituted an "overpayment" was intertwined with federal regulations establishing the "average wholesale price" that could be charged for a particular drug. See 2002 U.S. Dist. LEXIS 23013, at *34-35.[3] In Bacon v. KPMG LLP, No. 02-8012, 2002 U.S. Dist. LEXIS 17302 (W.D. Ark. June 21, 2002), the District Court for the Western District of Arkansas cited Chapin and found substantial federal question jurisdiction over an action for fraud, conspiracy, and breach of fiduciary duty because the underlying investment products owed their existence to federal law. In none of these cases would subject matter jurisdiction have existed under the "essential element" test adopted by the panel majority. Because it applied a test that is inconsistent with this Court's intervening decision in Chapin, the Court should vacate the petition, recall the judgment, and remand for reconsideration in light of Chapin.

II. UNDER CHAPIN, SEVERAL SUBSTANTIAL FEDERAL QUESTIONS ARE EMBEDDED IN THESE COMPLAINTS.

A. Reconsideration In Light Of Chapin Will Change The Jurisdictional Outcome.

Given the numerous connections between Respondents' complaints and the FCC's RF safety and testing regulations,

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[3] Alpon Laboratories found a substantial federal question per normative test declined jurisdiction on homestead grounds because the Medicaid program is primarily administered by the States. See 2002 U.S. Dist. LEXIS 23013, at *32-36. That rationale is clearly not applicable here. Even the primacy of federal regulation of the radio waves

there should be little direction that a "contextual enquiry" of the kind mandated by Carlyle should lead to a different result. Contrary to Respondents' suggestion, see Opp. at 4-5, many of these connections are evident from the face of the relevant complaints. The complaints allege that "[t]he specifications of the patent and circuitry" – in other words, the technical specifications of the phones Respondents allege to be defective – "are determined by the Cell Phone Carrier's license and frequency information given by the FCC." Per App. 153a. The complaints allege that the process by which calls are transferred across a wireless network, a process that necessarily relates to the RF emission levels of wireless phones, is "[p]ased upon the license given by the FCC." Id. The complaints further allege that the defendants issued a report that "stated that cell phones fell within the safety standards of the Federal Communications Commission (FCC)." Id. 158a. The complaint discusses at length "[t]he FDA's 'Update on Mobile Phones.'" Id. 131a-134a. To suggest, as Respondents do, that "nothing on the face of the complaints" in these tort actions would suggest the existence of a substantial federal question, Opp. at 4, runs counter to a substantial body of the complaints themselves.

While the express text of the complaints reveals numerous connections between Respondents' claims and the federal RF safety and testing regulatory regime, a "contextual enquiry" reveals even more fundamental links. Without mentioning federal law, for example, the complaints allege that Petitioners "operate[d] and exercise[d] dominance and control over the American National Standards Institute ("ANSI"). Committee responsible for developing safety standards for RFR emitting devices." Per. App. 152a. Yet the ANSI standard Respondents challenge as inadequate are the very standards adopted by the FCC in its RF emissions regulation. See 47 C.F.R. § 2.1091(d) ("The limits to be used for evaluation are based generally on criteria published by the American National Standards Institute (ANSI) for localized

specific absorption rate ("SAR") . . . ." The mere fact that the complaint neglected to mention the fact that the challenged ANSI standard does the status of federal law cannot change the fact that Respondent's allegations raise a substantial federal question." This is nothing more or less than a claim of "grand nbon the agency" ονει which federal jurisdiction is obvious. See Bachman Co. v. Plaintiff, Legal Comm., 231 U.S. 341 (1001).

Similarly, the complaint allege that Petitioners "fail[ed] to fulfill their ongoing obligation to conduct adequate testing" for potential RF-related health effects. Per. App. 191a. Yet the requirement that *writers* bpones pe tested for RF emissions is created by the same FCC regulation. See 47 C.F.R. § 2.1093. Again, Respondents' omission of specific references to federal law in the text of their complaints is not controlling.

The substantial connection between Respondents' complaints and the FCC safety and testing regulatory regime is further underscored by the similarity between the complaints' allegations and the matters resolved in *two* federal Hobbs Act challenges to the FCC's RF rulemaking proceeding. In one of those proceedings, for example, the petitioners argued that the FCC did not sufficiently consider "non-thermal" effects of RF energy. The Second Circuit rejected that contention, holding that the ANSI standard *was* properly adopted by the FCC. See Cellular Phone Taskforce v. FCC, 205 F.3d 82, 90 (2d Cir. 2000). In the other proceeding, the petitioners argued that the FCC failed to consider information allegedly suggesting that "cell bpone radiation might bromote cancer" – another allegation directly connected to Respondents' allegations here – but the District of Columbia

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" Respondents' challenge to the ANSI standard that forms the basis for the FCC's RF emissions regulation is central to the entire case. See Per. App. 152a-158a.

Circuit rejected that contention, again affirming the validity of the FCC's regulation. *See EMA Network v. FCC*, 391 F.3d 505, 514 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2552 (2005). The municipalities petitioned the commission here and the Hobbs Act proceedings challenging the FCC's RE safety and testing regulations three dissenting Senior Judge Kiser's jurisdictional point. These actions are a disguised challenge to federal regulations, and amount to a third attempt to seek judicial review of a federal rulemaking proceeding. There is an important federal interest in prevailing such actions decided in federal court.[2]

Respondents' explanation for why these connections between their complaints and the exclusive FCC safety and testing regulatory regime are somehow insufficient to confer supplemental federal question jurisdiction is that the connections are not all specifically enumerated on the face of their complaints. According to Respondents, the "well-pleaded complaint" rule dictates that a plaintiff may avoid federal jurisdiction simply by omitting the language of federal law from the complaint. *See* Opp. at 12-18. Yet the supplemental federal question doctrine is an "exception to the well-pleaded complaint rule." *Shuter Health v. Unite Here*, No. 3:05-CV-1081, 2005 U.S. Dist. LEXIS 30895, at *18-19 (E.D. Cal. Aug. 10, 2005); *Bonita v. Carmichael*, No. CS-03-144, 2003 TAE Partorino Winery v. Duke Energy Trading & Mktg., L.L.C., 368 F. Supp. 2d 1340, 1348 (S.D. Ga. 2005); *Jackson v. Pharma Pharm Co.*, No. 8:05-cv-1458, 2005 U.S.

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[2] Respondents misconstrue the significance of Cellular Phone Taxpayers and EMA Network, suggesting that the "preclusive effect" of the judgments in those cases is a defense that can be presented in state court. Opp. at 18 n.7. The significance of those decisions is not that they are preclusive of Respondents' claims, but that the identity of issues involved demonstrates both that the four cases at issue here involve substantial federal questions and that there is a strong federal interest in preserving those questions resolved in federal court.

Dist. LEXIS 9998, at *10 (M.D. Fla. April 11, 2003). It thus cannot be thwarted by mere drafting tactics on the part of a given plaintiff.

In sum, there is every reason to believe that the court of appeals would reach a different interpretation conclusion if it applied the "contextual emphasis" standard of Chaple rather than the "essential element" standard originally applied below. Correction action therefore is warranted in these cases low.

A. Corrective Action Is Necessary to Avoid Propagation of the Panel's Error in the Fourth Circuit

Regardless of whether the outcome in the court of appeals would be different on remand in this particular case, the fact remains that the court of appeals has articulated an "essential element" test that, while inconsistent with Chaple, is nonetheless binding law in the Fourth Circuit. Cf. Holman v. Hunt, 138 F.3d 252, 254 (4th Cir. 1998) (noting that decision of one Fourth Circuit panel is binding on subsequent circuit panels). It is not uncommon for circuit panels to adhere to their prior dispositions following an order granting certiorari and vacating the judgment in light of intervening precedent from this Court. But even if the court were to adhere to its original disposition upon reconsideration, its analysis would necessarily be quite different in light of Chaple's redirection of a "contextual emphasis." For the benefit of future Fourth Circuit panels that will confront cases involving the substantial federal question doctrine, this Court should grant the petition, vacate the judgment, and remand for reconsideration in light of Chaple.

CONCLUSION

The Court should grant the writ of certiorari, vacate the judgment, and remand the case for reconsideration in light of Chaple.

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